

December 13, 1991

The Honorable John C. Lewin, M.D.
Director
Department of Health
Kinau Hale
1250 Punchbowl Street
Honolulu, Hawaii 96813

Attention: Eugene W. Pon, M.D., M.P.H.
Chief, Epidemiology Branch

Dear Dr. Lewin:

Re:Disclosure of the Sanitarian's Final Report Concerning a
Food Poisoning Incident

This is in response to your letter dated June 28, 1991
requesting an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the State of Hawaii Department of Health ("DOH") must make available for public inspection and duplication the sanitarian's final report concerning the fish market involved in a food poisoning incident ("sanitarian's final report"), including the fish market's name.

BRIEF ANSWER

The UIPA only recognizes the privacy interests of "individuals," which term is defined to mean "natural persons." Haw. Rev. Stat. . 92F-3 (Supp. 1990). Therefore, the fish market, which is not a natural person, does not have a privacy

interest in the sanitarian's final report under the UIPA. Thus, we find that the "clearly unwarranted invasion of privacy" exception contained in section 92F-13(1), Hawaii Revised Statutes, does not apply to the sanitarian's final report.

In our opinion, the sanitarian's final report constitutes "information compiled for law enforcement purposes." However, the DOH provided the fish market's owner a copy of the sanitarian's final report. Therefore, we believe that the disclosure of the sanitarian's final report would not "reasonably be expected to interfere with enforcement proceedings," or frustrate the DOH's investigative functions in any way. Thus, the sanitarian's final report would not fall within the scope of the UIPA's "frustration of a legitimate government function" exception. Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). Because we find that none of the UIPA exceptions to disclosure apply to the sanitarian's final report, the DOH must make this record, including the fish market's name, available for public inspection and duplication. See Haw. Rev. Stat. . 92F-11(a) (Supp. 1990).

FACTS

On July 22, 1990, the DOH, Epidemiology Branch, was notified that three members of a family in Maui had been hospitalized and treated for botulism, a form of food poisoning. Botulism can cause nerve dysfunction, muscle paralysis, and blurred vision, and can ultimately result in complete respiratory failure.

The DOH's investigation of this incident revealed that the afflicted family members had eaten palani, a scavenger fish, purchased at a certain retail fish market, which is registered as a business corporation in the State. The DOH's Epidemiology Branch informed the DOH's Sanitation Branch about the botulism incident which apparently stemmed from the palani fish purchased from this fish market. A DOH sanitarian was sent to inspect the fish market which sold the fish and interview its manager. The sanitarian learned that the fish market had purchased the palani from unidentified local fishermen, but it could not be determined when the fish had been caught, or how long the affected fish had been in the market before its sale.

After its on-site visit, the sanitarian instructed the fish market to inspect and properly refrigerate its fish, and recommended specific storage methods to be followed in the

future. The sanitarian's findings and recommendations to the fish market were set forth in a final report dated August 9, 1990, to a DOH epidemiological specialist ("sanitarian's final report"). The sanitarian's final report stated that the DOH will make follow-up inspections to ensure compliance with the recommendations set forth in the report. The sanitarian's final report did not contain the names, medical information, or any other individually identifiable information about the individuals who were stricken with botulism. A copy of this final report was sent to the fish market's owner.

Pursuant to agreements that have been reached with the health departments of all states, incidents in which food poisoning is the confirmed or probable cause of illness are reported to the United States Centers for Disease Control in Atlanta, Georgia ("CDC"). The DOH's report to the CDC that botulism had been contracted from the consumption of "fresh" palani in Hawaii was considered by the experts to be scientifically significant because this was apparently the first report in the United States of botulism being contracted from other than canned, processed, or preserved fish products. The CDC reported the Maui botulism incident in one of its publications in June, 1991. The CDC article was subsequently reported by the national news wire services and in newspapers across the country, including the Honolulu Star-Bulletin.

In order to write a follow-up article locally, a reporter from the Honolulu Star-Bulletin requested the DOH to release the name of the fish market where the suspect fish had been purchased. The DOH did not release the name of the market because there was no longer a health threat to the public. The DOH also noted that release of the market's name may cause undue hardship from bad publicity to the establishment. Subsequently, the DOH requested an advisory opinion from the OIP regarding whether the name of the fish market must be made available for public inspection and copying.

DISCUSSION

I. INTRODUCTION

The sanitarian's final report is a "government record," as this term is defined by the UIPA, because the final report constitutes "information maintained by an agency in written

. . . form." Haw. Rev. Stat. . 92F-3 (Supp. 1990). The UIPA begins with the premise that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). Section 92F-13, Hawaii Revised Statutes, sets forth exceptions to this general rule of required disclosure and, in pertinent part, provides:

. 92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

. . . .

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

Haw. Rev. Stat. . 92F-13(1), (3) (Supp. 1990). These exceptions are further discussed separately below.

II. CLEARLY UNWARRANTED INVASION OF PRIVACY

The UIPA states that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1990) (emphasis added). Notably, the UIPA only recognizes "the privacy interests of the individual" which term is defined to mean "a natural person." Haw. Rev. Stat. . 92F-3 (Supp. 1990). According to the facts before us, the fish market is a business corporation, which is not a natural person. As a corporate entity, the fish market has no privacy interest recognized by the UIPA. See OIP Op. Ltrs. Nos. 89-1 (Sept. 11, 1989), 89-5 (Nov. 29, 1989), 89-13 (Dec. 12, 1989), 91-21 (Nov. 21, 1991).

Furthermore, we need not consider the privacy interests of the infected individuals since no individually identifiable information about them is provided in the sanitarian's final

report. See OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (no privacy interest in interview scores summary that does not reveal the identities of the job applicants who received the corresponding interview scores). Therefore, the sanitarian's final report, including the name of the fish market, would not be protected from disclosure under the "clearly unwarranted invasion of privacy" exception contained in section 92F-13(1), Hawaii Revised Statutes.

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The Legislature had definite ideas about the types of records the disclosure of which would rise to the level of "frustration of a legitimate government function" under the exception contained in section 92F-13(3), Hawaii Revised Statutes. Specifically, Senate Conference Committee Report No. 2580, dated March 31, 1988, sets forth "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," including "[r]ecords or information compiled for law enforcement purposes." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added).

In our opinion, the sanitarian's final report constitutes "information compiled for law enforcement purposes" because it sets forth the information compiled by the sanitarian in connection with its enforcement of health laws and administrative rules governing food establishments. See Haw. Rev. Stat. . 321-11(18) (1985) (DOH's statutory authority to adopt rules governing food establishments). However, as we discussed in prior OIP advisory opinions, not all law enforcement records, if disclosed, would result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. See, e.g., OIP Op. Ltr. Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990).

In previous opinion letters, we discussed that exemption (b)(7) of the federal Freedom of Information Act, 5 U.S.C. . 552(b) ("FOIA"), protects from disclosure "records or information compiled for law enforcement purposes" only to the extent that disclosure would cause one of the harms specified in the exemption. 5 U.S.C. . 552(b)(7) (1988). Although not controlling, this FOIA exemption, and case law applying it, provide useful guidance in applying the UIPA's "frustration of a legitimate government function" exception to information

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compiled for law enforcement purposes. See OIP Op. Ltr. Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990) (contain the text of FOIA exemption (b)(7)).

In OIP Opinion Letter Nos. 89-17 and 90-36 respectively, we found that the DOH's statements of deficiencies and plans of corrections relating to adult residential care homes, and the Maui County Department of Public Works' notices of violations of building and zoning codes, constitute records compiled for law enforcement purposes. However, in both opinions, we concluded that the disclosure of the records at issue would not cause any of the harms specified in FOIA exemption (b)(7), particularly the harm that disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. . 552(b)(7) (1988). We reached this conclusion because in each case, the subject of the investigation was given a copy of the record describing the subject's deficiencies or violations and the necessary corrective actions. Therefore, public disclosure of the record would only give the subject of the investigation access to information already in its possession. See OIP Op. Ltr. Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990); see also Goldschmidt v. United States Dep't of Agriculture, 557 F. Supp. 274 (D.D.C. 1983) (inspection reports concerning meat or poultry plants); Cunningham v. Health Officer of Chelsea, 385 N.E.2d 1011 (Mass. App. Ct. 1979) (inspection reports concerning housing code violations); Citizens for Better Care v. Reizen, 215 N.W.2d 576 (Mich. App. Ct. 1974) (facility evaluation reports concerning nursing homes).

In Goldschmidt, the court held that the United States Department of Agriculture was required to disclose the inspection reports of meat and poultry plants because the alleged violators were customarily given a copy of the inspection reports and, thus, the reports' disclosure would not interfere with enforcement proceedings. In response to the Department's argument that the disclosure of the inspection reports would discourage voluntary corrections of violations, the court reasoned that the opposite may be true, stating, "[c]ommon sense suggests that the possibility of adverse publicity would be at least likely to encourage compliance with regulations as discourage it." 557 F. Supp. at 278.

According to the facts presented, the sanitarian's final report was provided to the owner of the fish market, the subject of the DOH's law enforcement investigation in this matter.

Public disclosure of this report would not give the fish market owner any additional information about the DOH's investigation that the owner does not already possess. Applying the analysis set forth in the OIP opinions cited, we do not believe that the public disclosure of this record would "reasonably be expected to interfere with law enforcement proceedings" or impede the DOH from obtaining similar information in the future. See OIP Op. Ltr. No. 89-17 at 8 (Dec. 27, 1989). Furthermore, the disclosure of the inspection report would not likely discourage, and may even encourage, the fish market's voluntary compliance with the sanitarian's recommendations for improving its fish storage methods. See Goldschmidt, 557 F. Supp. 274.

We find that the disclosure of the sanitarian's final report also would not result in any of the other harms recognized by FOIA exemption (b)(7) by revealing the identity of, or information furnished by, a confidential source, depriving an individual of a right to a fair trial, or revealing techniques and procedures for law enforcement investigations that could reasonably be expected to risk circumvention of the law. Also, we do not believe that the disclosure of the final report could reasonably be expected to endanger the life or physical safety of any individual. Accordingly, we find that although the sanitarian's final report constitutes "[r]ecords or information compiled for law enforcement purposes," the disclosure of this report would not result in the frustration of the DOH's legitimate government function of enforcing health laws and administrative rules. See Haw. OIP Op. Ltr. Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990). Because we find that none of the UIPA exceptions to disclosure applies to the sanitarian's final report, this record, including the fish market's name contained therein, must be made available for public inspection and copying.

CONCLUSION

We find that the "clearly unwarranted invasion of privacy" and "the frustration of a legitimate government function" exceptions to disclosure provided in the UIPA do not apply to the sanitarian's final report, including the fish market's name. First, we note that the UIPA recognizes only the privacy interest of "individuals." Secondly, we find that the disclosure of the sanitarian's final report would not "reasonably be expected to interfere with enforcement

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proceedings," or frustrate any other legitimate government function, since the DOH has provided the fish market's owner with a copy of the final report. Therefore, the DOH must publicly disclose the sanitarian's final report, including the fish market's name contained therein.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL:sc